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In The

Supreme Court of the United States

October Term, 1994

CHARLES LOUIS ALLARD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether state search warrant law is relevant to determine the legality of a search and the validity of a state search warrant when the search is conducted entirely by state officers who seize evidence ultimately used in a federal criminal proceeding.

II. Whether federal search warrant law, specifically 18 U.S.C. § 3102, Authority to Issue Search Warrants, is relevant when determining the legality of a search and the validity of a state search warrant when the search is conducted entirely by state officers who seize evidence ultimately used in a federal criminal proceeding.

III. Whether the search warrant requirements of Rule 41 of the Federal Rules of Criminal Procedure are relevant when determining the legality of a search and the validity of a state search warrant when the search is conducted entirely by state officers who seize evidence ultimately used in a federal criminal proceeding.

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OPINIONS BELOW

The Opinion of the Court of Appeals for the Sixth Circuit below is No. 94-1370 (Appendix A, *infra*) and is unreported. The Opinion and Order of the District Court for the Eastern District of Michigan, dated October 4, 1993, denying suppression of evidence (Appendix B, *infra*) is unreported.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked following entry of an opinion of the United States Court of Appeals for the Sixth Circuit on January 5, 1995. Jurisdiction is pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 20.1.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution: Article VI(2):

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws or any State to the Contrary notwithstanding.

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not

> be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

18 U.S.C. § 3102:

> Federal, State or Territorial Judges, or U.S. magistrates authorized to issue search warrants, Rule 41(a).

Federal Rules of Criminal Procedure Rule 41:

> F.R.C.P. 41(a); 41(a)(1); 41(c)(1); 41(c)(2)(A); 41(c)(2)(C); 41(c)(2)(D). Provided in Appendix C, *infra.*

Michigan Compiled Laws 780.653 (MSA 28.1259(3)):

> (3) A judge may issue a written search warrant in person or by any electronic or electromagnetic means of communication. If a court order required pursuant to section 625a of the Michigan vehicle code, Act. No. 300 of the Public Acts of 1949, being section 257.625a of the Michigan Compiled Laws, is issued as a search warrant, the written search warrant may be issued in person or by any electronic or electromagnetic means of communication by a judge or by a district court magistrate.

Appendix D, *infra.*

STATEMENT OF THE CASE

A. Procedural Overview

Charles Allard was indicted on July 7, 1993 for four counts of conspiracy and possession with intent to distribute a controlled substance and use or carrying a firearm during and in relation to a drug trafficking crime, in violation of 21 U.S.C. § 846; 21 U.S.C. § 841(a)(2); 21 U.S.C. § 841(b)(1)(B) and 18 U.S.C. § 924(c)

The indictment was based upon evidence seized by state officers pursuant to a state search warrant executed on the night of January 11, 1993.

On October 4, 1993 the United States District Court for the Eastern District of Michigan, Honorable Gerald E. Rosen, District Judge, issued a written opinion denying petitioner's motion to suppress evidence pursuant to an illegal search and seizure.

On March 28, 1994 the district court accepted Mr. Allard's conditional plea to one count of possession with intent to distribute a controlled substance and sentenced Mr. Allard to serve 46 months in a federal minimum security prison.

In an Opinion filed January 5, 1995, the United States Court of Appeals for the Sixth Circuit affirmed the district court's Order Denying Suppression.

B. Background — Undisputed Facts

On the night of January 11, 1993, state officers faxed a Search Warrant and an Affidavit for Search Warrant to the home of state district court magistrate Lloyd Erdman. Magistrate Erdman signed the search warrant and faxed it back to the state officers.

At 10:30 p.m., the state officers executed this faxed warrant at the home of petitioner Charles Allard seizing marijuana which was used as evidence in this federal criminal proceeding.

Petitioner challenged the evidence on the grounds that the search was illegal because: the search warrant violated state law which only allows a state judge to issue facsimile search warrants for a home; the county magistrate was not authorized under 18 U.S.C. § 3102 to issue this search warrant for evidence to be used in a federal proceeding; and the search violated twelve individual search warrant requirements of Rule 41 of the Federal Rules of Criminal Procedure.

The district court denied suppression holding that state law does not apply in a federal criminal proceeding; 18 U.S.C. § 3102 is the same as Rule 41(a); and the requirements of Rule 41 of the Federal Rules of Criminal Procedure do not apply if a search warrant is obtained and executed by state officers.

The district court held:

> It is well-settled that it is *federal law*, not state law, which governs the validity of a search warrant and admissibility of evidence in a federal criminal proceeding, even when the investigation and search are conducted solely by state officers.

Appendix B, 14a.

> Rule 41 does not apply where, as in this case, only state officials are involved.

Appendix B, 10a (footnote).

The Court of Appeals for the Sixth Circuit affirmed the district court's determinations.

REASONS FOR GRANTING THE WRIT

Pursuant to the lower court's decision in this case, there is no legislative control over the issuance or execution of a search warrant if the warrant is obtained by state officers for evidence used in a federal proceeding.

State law is irrelevant because the proceeding is brought in federal court. Federal law, as codified in Rule 41 of the Federal Rules of Criminal Procedure, is irrelevant because the warrant is obtained and executed by state officers.

By express declaration, Article VI section 2 of the United States Constitution provides for the creation of legislation to uphold the Constitution. The Fourth Amendment is not self-executing as it fails to provide procedures for the issuance and execution of a search warrant. When a constitutional amendment requires performance of an act but provides no *means* for the performance of the act, the Constitution empowers Congress to enact the necessary legislation.

This circumvention of all legislation, as done by the lower courts in this case, violates the very essence of the Constitution and the Fourth Amendment.

A good faith execution of a warrant is not even necessary if a warrant can never be challenged as invalid under state or federal law.

The lower courts in this case relied upon federal appellate decisions from the Second, Third, Sixth and Ninth Circuits in 1987, 1984, 1992 and 1987 respectively. A federal agency, the Organized Crime and Drug Enforcement Task Force (OCDETF)

has made extensive use of this judicially created evasion of search warrant law. Exhibit E provides excerpts from OCDETF's 1990 Report to President George Bush which emphasizes the recent successful use of state and local officers for initiation and indictments in federal criminal proceedings. As early as 1990, over one half of OCDETF's federal cases involved state and local investigations. Appendix E, 29a.

In the instant case, the state officers obtained the search warrant in reliance upon information and the use of a confidential informant. This confidential informant was under federal indictment at that time.

The federal prosecutor named in the indictment against the confidential informant is the OCDETC coordinator for the Great Lakes Region.

This circumvention of both state and federal search warrant law is a matter of national significance which has not been, but should be settled by this Court.

CONCLUSION

For the foregoing reasons, petitioner Charles Allard asks that his Petition for Certiorari be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED JANUARY 5, 1995

NO. 94-1370

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES LOUIS ALLARD,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

BEFORE: ENGEL, MARTIN ad BOGGS, Circuit Judges.

PER CURIAM. Charles Louis Allard appeals his conviction and sentence for possession of marijuana with intent to distribute in violation of 21 U.S.C. § 841(a)(1). On appeal, Allard challenges the district court's denial of his motion to suppress evidence found during a search of his residence. For the reasons that follow, we affirm the district court's decision.

In January 1993, a confidential source informed Sergeant Allan Reed of the Michigan State Police that Allard was distributing large amounts of marijuana. The source indicated

that he had purchased marijuana from Allard on ten to fifteen occasions, ranging in amounts from ten to seventy-five pounds, between 1985 and 1992. He also informed Reed that Allard had approximately sixty pounds of marijuana at his home in Fenton, Michigan. Using this information, Reed arranged for the informant to telephone Allard in order to purchase marijuana. On January 10, the call was made and the informant told Allard that he had found a buyer for Allard's marijuana. The next day, Reed escorted the informant to Allard's house for a controlled purchase of two pounds of marijuana. After this purchase, Reed applied for a search warrant with the assistance of Daniel Garber, Assistant Livingston County Prosecutor.

Reed and Garber faxed the search warrant application to a state magistrate for review. Reed swore to the affidavit attached to the application over the phone with the magistrate. The magistrate determined that probable cause existed, signed the warrant, and faxed a copy back to Reed. Once the signed warrant was received, it was executed at Allard's house, where police officers found one hundred sixty-one pounds of marijuana, two firearms, $18,000 cash, and drug paraphernalia. To this point, this was entirely a state investigation, conducted by members of the Livingston and Washtenaw Narcotics Enforcement Team; no federal investigators were involved.

On July 7, 1993, a federal grand jury returned a three-count indictment charging Allard with drug and firearm offenses against the United States. Among his pre-trial motions filed August 16, Allard moved to suppress all evidence seized from his house during the search warrant's execution. After the United States responded to these motions and Allard replied, the district court held a hearing on the motion to suppress. The court rejected Allard's argument, based on the time stamp from the faxed

warrant, that the search occurred before the warrant was signed. The court also rejected Allard's claim that the warrant failed to state the place to be searched or items to be seized with particularity. The court then stated that it would issue an opinion and order resolving the other issues raised by Allard. Before this could be done, however, Allard filed another brief supplementing his motion to suppress.

On October 6, the district court denied Allard's motion to suppress the seized evidence. In doing so, it held that Rule 41 of the Federal Rules of Criminal Procedure applied only where a search warrant was sought by federal officers, that federal law governs the admissibility of evidence, and that the "good faith" exception precluded suppression under the circumstances of this case. Allard filed an interlocutory appeal of this decision which was dismissed as premature. Allard then pled guilty to count three of the indictment, possession with intent to distribute, on December 8, 1993. On March 28, 1994, Allard was sentenced to forty-six months' imprisonment. Pursuant to the plea agreement, he retained the right to appeal the denial of his motion to suppress and filed this timely notice of appeal on April 4, 1994.

On appeal, Allard makes several claims of error in the district court's decision denying his motion to suppress. Allard first claims that 18 U.S.C. § 3102 controls the authority to issue search warrants in federal proceedings. He then alleges twelve violations of the requirements of Rule 41 of the Federal Rules of Criminal Procedure, and claims the district court erred in finding that Rule 41 did not apply because the warrant was executed by state officers. Next, Allard maintains that the evidence should have been suppressed because it was obtained in violation of state law, specifically that a magistrate is not authorized under Michigan law to issue a warrant via facsimile machine to search a

residence. Allard then argues that, in the process of faxing the signed warrant to the officers, it became "truncated" and thus failed to describe the location or items to be seized with particularity. Finally, Allard contends that the "good faith" exception does not apply here. Although recognizing that the magistrate had the power to issue a warrant, he maintains that no warrant was actually "issued" here to be executed.

In reviewing a district court's decision on a motion to suppress evidence, we defer to the district court's factual findings, which are to be upheld unless clearly erroneous. *See United States v. Coleman*, 628 F.2d 961, 963 (6th Cir. 1980). However, the district court's conclusions of law are subject to *de novo* review. *See Whitney v. Brown*, 882 F.2d 1068, 1071 (6th Cir. 1989) . In reviewing the district court's decision, we must view the evidence " 'in the light most likely to support the district court's decision.' " *United States v. Williams*, 962 F.2d 1218, 1221 (6th Cir. 1992) (quoting *United States v. Gomez*, 846 F.2d 557, 560 (9th Cir. 1988)). When viewed in this light, we find Allard's arguments to be unpersuasive.

To begin, Allard's first two arguments are essentially the same: 18 U.S.C. § 3102 simply refers to Rule 41 which establishes who is authorized to issue search warrants and the procedure to be followed in doing so. However, as we have previously noted, "by its terms Rule 41 does not apply in a case where no federal officers are involved." *United States v. Shields*, 978 F.2d 943, 946 (6th Cir. 1992); Fed. R. Crim. P. 41(a). Thus, the district court was not required to apply the requirements of Rule 41 in analyzing a search warrant requested and executed by state officers and issued by a state magistrate. Indeed, "analysis of the validity of a warrant obtained, as in this case, by state officers for seizure of evidence ultimately used in a federal

prosecution turns only on constitutional issues." *Shields*, 978 F.2d at n.5. Allard's attempts to distinguish *Shields* from the instant case are ineffective, relying again on his allegations of Rule 41 violations. Here, Allard does not challenge the magistrate's impartiality or his finding of probable cause to issue the warrant, but rather points to what he alleges are individual violations of Rule 41. Because Rule 41 does not apply in situations like this, and because Allard raises no constitutional challenges to the warrant, his arguments fail in this regard.

Allard's next argument, that the evidence was obtained in violation of Michigan law and should therefore be suppressed, is also unavailing. First, Allard's reading of Michigan law seems unduly narrow. He relies on M.C.L. § 780.651(3) to argue that Michigan law allows a state magistrate to issue a warrant by facsimile only for blood alcohol testing in connection with a traffic stop. However, that section begins by stating that "[a] judge may issue a written search warrant in person or *by any electronic or electromagnetic means* of communication." M.C.L. § 780.651(3) (emphasis added). The later specification of a facsimile machine does not serve to limit its use. Further, even were Allard correct in his narrow reading of Michigan law, federal law, not state law, governs a search warrant's validity and the admissibility of evidence in a federal criminal proceeding. *United States v. Wright*, 16 F.3d 1429, 1434 (6th Cir. 1994); *Shields*, 978 F.2d at 945-46; *United States v. Allen*, 954 F.2d 1160, 1167-68 (6th Cir. 1992). Allard's examination of the faxing procedure used to issue the warrant in this case, concerned wholly with whether it violated state law, is thus irrelevant in determining its validity in federal criminal proceedings. *See Wright*, 16 F.3d at 1437 (holding that the fact that the search "may have violated state law is irrelevant as long as the standards developed under the Federal Constitution were not offended").

Appendix A

In analyzing the faxing procedure used here, Allard further argues that the warrant became "truncated" in is return to the state police officers and thus failed to meet the particularity requirements of the Fourth Amendment. However, the search warrant that was signed by the magistrate contained a complete description of the location to be searched and the items to be seized. Allard challenges only the warrant that was faxed back to the executing officers. Allard claims that the officers, lacking a detailed description *in hand,* were forced to conduct a general search, "a random, exploratory seizure." But, as the district court noted, this argument fails because the executing officers were also the investigating officers who drafted the search warrant application in the first place. Even assuming the warrant had been shortened in faxing it, the district court found that the officers knew the extent and scope of the signed warrant and complied with it. Allard does not challenge the officers' compliance with the warrant, but merely that they might have exceeded its scope because they did not have the entirety of the warrant with them. Yet, Allard does not refer this Court to any authority for the proposition that state officers executing a search warrant must have a true and correct copy of the warrant in hand during the search.

Finally, Allard contests the applicability of the "good faith" exception in this case. Allard argues that the search warrant here was not "issued" prior to its execution, and thus at that time there was no "warrant" for the officers to execute in good faith. In making this argument, Allard concedes that the magistrate had the judicial power to issue a warrant. Allard relies on the time stamped on the faxed copy of the warrant to contend that it had not yet been issued when the warrant was executed. However, the district court found that this was simply the result of the magistrate's not changing the time on his facsimile machine from

daylight savings to standard time. Allard has not shown this finding to be clearly erroneous. *Williams*, 962 F.2d at 1221. Further, Allard's argument fails to refute the "good faith" exception articulated in *United States v. Leon*, 468 U.S. 897 (1984). In *Leon*, the court held that evidence is admissible so long as it is "seized by officers reasonably relying on a warrant issued by a detached and neutral magistrate." *Id.* at 913. Because Allard does not contest the reasonableness of the officers' reliance or that the issuing magistrate was detached and neutral, under *Leon*, suppression of the evidence would not be required even were the warrant found to be invalid.

For the foregoing reasons, we AFFIRM the decision of the district court.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DATED OCTOBER 4, 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Crim. No. 93-CR-80734

Hon. Gerald E. Rosen

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES LOUIS ALLARD,

Defendant.

OPINION AND ORDER DENYING
DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

At a session of said Court, held in the U.S. Courthouse
Detroit, Michigan on OCT 4 - 1993

PRESENT: Honorable Gerald E. Rosen
United States District Judge

I. INTRODUCTION

Defendant Charles Louis Allard has been charged in a four-

count narcotics and firearms indictment alleging possession, distribution and conspiracy to possess and distribute large quantities of marijuana (Counts I-III), and using or carrying a firearm in connection with a drug trafficking crime (Count IV).

On September 21, 1993, the Court conducted a hearing on a number of motions filed by Defendant Allard. The seven motions heard on September 21 included: four discovery motions,[1] a Motion for Bill of Particulars, a Motion for a *Franks* Hearing; and a Motion to Suppress Evidence.

Counsel represented to the Court on the record that the four discovery motions had been resolved. With respect to two of the motions — Defendant's Motions for a Bill of Particulars and for a *Franks* Hearing — the Court ruled from the bench and DENIED both of those motions.

With respect to Defendant's Motion to Suppress, the Court ruled from the bench on two of the arguments for suppression raised by Defendant: the Court denied Defendant's motion to suppress on his "timing of execution of the search warrant" argument and also denied the motion on his "lack of particularity of the warrant" argument. However, the Court took under advisement Defendant's third argument for suppression, i.e., his argument that the evidence must be suppressed because the issuance of the warrant by state court Magistrate Lloyd Erdman violated Michigan search warrant issuance law.[2]

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1. These specific discovery motions are: Defendant's Motion for Notice from the Government Regarding 404(b) Evidence; Motion for Disclosure of *Brady* materials; Motion for Future Discovery; and Motion to Require Disclosure and Production of Government Informants and Co-conspirators.

2. Defendant had also argued that the search warrant was issued in violation (Cont'd)

Appendix B

Having further reviewed and considered the parties' briefs and oral arguments on the applicability, and effect of violation of state law in determining the validity of the search warrant in a federal prosecution, the Court is now prepared to rule on this last suppression of evidence argument. This Opinion and Order sets forth that ruling.

II. FACTUAL BACKGROUND

In early January of this year, Michigan State Police Det./Sgt. Allan Reed received information from a confidential informant (CI) that he had purchased large quantities of marijuana (10 to 75 lbs. at a time) from Defendant Charles Louis "Chuck" Allard on 10 to 15 occasions between 1985 and 1992. The CI advised Sgt. Reed that Allard gets large amounts of marijuana delivered to his home from Mexico and Arizona, and that Allard kept the marijuana he had for sale under his basement steps.

(Cont'd)
of Fed. R. Crim. Pro. 41(a). However, as the Court stated on the record on September 21, 1993, Fed. R. Crim. Pro. 41(a) only applies when *federal* officials (as opposed to state officials) seek and obtain the search warrant. Rule 41 does *not* apply where; as in this case, only state officials are involved. *See United States v. Shields*, 978 F.2d 943, 946 (6th Cir. 1992). Therefore, the Court rejected Defendant's violation of Rule 41(a) argument.

The Court also rejected Defendant's argument that state court magistrates are not authorized under 18 U.S.C. § 3102 to issue search warrants. Defendant based this argument solely on the "reference" under the heading of Section 3102 of Title 18 of the U.S. Code which says "SEE FEDERAL RULES OF CRIMINAL PROCEDURE — Federal, State or Territorial Judges, or U.S. Magistrates authorized to issue search warrants, Rule 41(a)." Defendant had argued that because "state magistrates" are not listed in this reference caption, they are not authorized to issue search warrants.

Appendix B

The CI further stated that he had recently been contacted by Allard in December of 1992 and told by Allard that he had a large amount of marijuana for sale. The CI also told Sgt. Reed that he been at Allard's house on January 5, 1993 and observed approximately 60-100 lbs. of marijuana made up into "bricks" on the basement steps in Allard's house.

Based on the foregoing information, Sgt. Reed arranged for the CI to make a consensual telephone call to Defendant on January 10, 1993, in an attempt to purchase some marijuana. During the course of the call, the CI told Allard that he had a buyer for 100 lbs. of marijuana. Allard had two types of marijuana for sale: regular quality marijuana for $975/lb. and "high" quality for $1500/lb. (The telephone call was taped by Sgt. Reed.)

After the phone call, Sgt. Reed arranged for the CI to make a controlled purchase the next night (January 11th) at Allard's house of two pounds of marijuana — one pound of regular and one pound of "high" quality on the pretext of obtaining samples of the two qualities for the buyer who wanted 100 lbs. The CI was wired during the January 11 transaction with Allard. After leaving Allard's house, the CI turned the marijuana over to the Michigan State Police.

After receiving the marijuana, Sgt. Reed returned to State Police headquarters in Brighton, and with the assistance of Assistant Livingston County Prosecutor Daniel Garber, Reed drafted a search warrant application. The application together with Sgt. Reed's affidavit, was faxed to Michigan District Court Magistrate Lloyd Erdman at 9:48 p.m. on January 11th. Over the phone with Magistrate Erdman, Sgt. Reed swore to the affidavit that was attached to the search warrant application. Finding probable cause to believe that contraband could be found in

Defendant's home, Magistrate Erdman signed the search warrant and faxed a copy of it back to the Brighton State Police headquarters at 10:00 p.m.

At 10:30 p.m., the State Police executed the search warrant, and found in Allard's house: two duffle bags, each containing large amounts of marijuana; 4 plastic garbage bags full of marijuana; and a tool box full of marijuana (total marijuana found: 161 lbs.); two firearms; drug paraphernalia; and $18,000 cash.

III. DISCUSSION

Defendant claims that the evidence found in his house should be suppressed because Magistrate Erdman was not empowered under Michigan law to use a faxing procedure to issue the search warrant for the search of Allard's residence. Defendant does not challenge either the impartiality of the magistrate or the finding of probable cause.

Defendant argues that, while Michigan law permits state court magistrates to issue search warrants and also provides for issuance of search warrants via electronic/electromagnetic communication (i.e., faxing), under Michigan law, the general permission to issue warrants *via telefax* only extends to judges, *not* to magistrates. According to Defendant, pursuant to M.C.L. § 780.651, state court magistrates may only use a fax method for issuing "search warrants" which are actually court orders issued to impose testing under the drunk driving laws.

Defendant relies upon M.C.L. § 780.651, which provides in pertinent part:

Appendix B

(1) When an affidavit is made on oath to a magistrate authorized to issue warrants in criminal cases, and the affidavit establishes grounds for issuing a warrant pursuant to this act, the magistrate, if he or she is satisfied that there is probable cause for the search shall issue a warrant to search the house, building or other location or place where the property or thing to be searched for and seized is situated.

* * *

(3) **A judge may issue a written search warrant** in person or **by any electronic or electromagnetic means** of communication. ***If a court order required pursuant to section 625a of the Michigan vehicle code. Act No. 300 of the Public Acts of 1949 being section 257.625a of the Michigan Compiled Laws is issued as a search warrant the written*** **search warrant may be issued** ***in person or by any electromagnetic means of communication by a judge or by a district court magistrate.***

M.C.L. § 780.651(1), (3) (emphasis added).

While the Court finds Defendant's narrow construction of § 780.651 to be strained, even assuming that Defendant's construction of the Michigan statute is correct, Defendant's reliance on state law in this instance is wholly misplaced.

Appendix B

It is well-settled that it is *federal law*, not state law, which governs the validity of a search warrant and admissibility of evidence in a federal criminal proceeding, even when the investigation and search are conducted solely by state officers. *See United States v. Shields*, 978 F.2d 943, 945-946 (6th Cir. 1993); *United States v. Allen*, 954 F.2d 1160 (6th Cir. 1992); *United States v. Loggins*, 777 F.2d 336, 338 (6th Cir. 1985). This is not only the law of the Sixth Circuit but also of every circuit that has been called upon to address this issue. *See United States v. Chavez-Vernaza*, 844 F.2d 1368, 1372-1374 (9th Cir. 1987); *United States v. Pforzheimer*, 826 F.2d 200, 203-204 (2d Cir. 1987); *United States v. Rickus*, 737 F.2d 363-364 (3rd Cir. 1984).

As the Sixth Circuit stated in *United States v. Allen, supra.* and in virtually every instance in which arguments similar to those advanced by Defendant in this case were presented:

> [T]he fact that state law may now require greater protection against searches and seizures [than federal law] is of no avail to a defendant in federal court, under prosecution of a federal crime.
>
> * * *
>
> The state may reserve certain rights including a stricter standard of search and seizure law; however, such a standard does not have to be applied in federal court. [Citation omitted.] Defendants do not argue that under federal law the search in question was illegal. We [therefore] conclude that the district court did not err in adopting the magistrate judge's

report and recommendation denying defendant's motion to suppress the evidence.

954 F.2d at 1167-1168. *See also, United States v. Smith,* 966 F.2d 1045, 1049 (6th Cir. 1992) (the fact that search of defendant's property violated Tennessee law was irrelevant; only federal law applies in federal prosecution) *United States v. Combs*, 672 F.2d 574, 578 (6th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982) (state law cannot impose on federal courts requirements more strict than those of the federal laws).

In *United States v. Chavez-Vernaza, supra,* a case relied upon by the Sixth Circuit in reaching its conclusion in *Allen*, the Ninth Circuit rejected the defendant's argument that state officials who conducted the investigation of his activities had seized the evidence used against him in his federal trial in violation of Oregon statutory law. The Oregon statute at issue in that case, Ore. Rev. Stat. § 192.555(1), set forth procedures to be followed to obtain financial records of a customer from a financial institution. The statute further provided that "evidence obtained in violation [of § 192.555] is inadmissible in any proceeding." 844 F.2d 1368, 1371 n. 1.

Relying in large part on the decisions of the Second Circuit in *United States v. Pforzheimer, supra*, and the Third Circuit in *United States v. Rickus, supra,* the *Chavez-Vernaza* court determined that even if the Oregon statute had been violated, violation of Oregon state law was irrelevant. The Ninth Circuit explained:

> [W]e have consistently stated that the admissibility of evidence obtained in violation of state law turns on whether a

federal right has been infringed. . . . In *[United States v.] Hall,* [543 F.2d 1229 (9th Cir. 1976), *cert. denied,* 429 U.S. 1075 (1977)], for example, we stated that federal courts are not bound by state statutory or constitutional provisions when determining whether evidence obtained by state officers in apparent violation of state law must be excluded in federal court:

> Where no [federal] constitutional right has been abused, the admissibility of evidence is governed by common law principles, not by local statute. . . . At common law, evidence was admissible regardless of its illegal origins. . . . Therefore, . . . *evidence obtained in violation of neither the Constitution nor federal law is admissible in federal courts. even though obtained in violation of state law.* . . .

* * *

Moreover, to hold that federal courts must look to state law to determine the admissibility of evidence seized by state officials acting independently of federal agents would create an unnecessary conflict with other circuits. In *Rickus,* the Third Circuit directly confronted the issue raised in this appeal. The court refused to create an exception to the rule that evidence obtained in

accordance with federal law is admissible in federal court even when obtained by state officers in violation of state law. The court reasoned that applying the exclusionary rule to evidence seized in violation of state laws would hamper the enforcement of valid federal laws by rendering relevant and reliable evidence unavailable. *Rickus*, 737 F.2d at 364....

Similarly, in *United States v. Pforzheimer*, 826 F.2d 200 (2d Cir. 1987), the Second Circuit held that evidence that is admissible under federal law should not be barred from a federal trial because of a state exclusionary rule.... The court held that important federal policy considerations, including the desirability of uniformity of evidentiary rules among the federal courts, outweigh interests of comity and support the application of federal law in federal courts. *Id.* at 204.

We agree with the Second and Third Circuits that requiring federal district courts to look to state law when determining the admissibility of evidence obtained in accordance with federal law would hamper the enforcement of valid federal laws and undermine the policy favoring uniformity of federal evidentiary standards.

844 F.2d at 1373-1374 (emphasis in original).

Appendix B

That federal common law governs the validity of a search warrant even where the warrant was obtained and executed solely by state officers was reiterated by the Sixth Circuit in *United States v. Shields, supra.* Quoting *Elkins v. United States*, 363 U.S. 206, 224 (1960), the *Shields* court explained the test of the validity of a search warrant as follows:

> "The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed." *Elkins*, 364 U.S. at 224, 80 S.Ct. at 1447....
>
> Under federal law, when judging the validity of a warrant, the issue is whether the Fourth Amendment has been violated or in other words, "whether the judicial officer had a substantial basis for finding that the affidavit established probable cause to believe that the evidence would be found at the place cited." *United States v. Loggins*, 777 F.2d 336, 338 (6th Cir. 1985).

987 F.2d at 945-946.

By application of the foregoing cited authority, the Court finds that Defendant's state law faxing procedure arguments are irrelevant. And, because the Court finds that Sgt. Reed's affidavit presented a substantial basis for Magistrate Erdman to believe that contraband would be found at Charles Allard's residence, the warrant for the search of Allard's house was valid.

Moreover, even if the Michigan warrant issuance statute were applicable in this case, and even if that statute were violated,

the "good faith" exception established in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), would apply and would serve to preclude suppression of the evidence seized from Allard's residence.

As the *Leon* court explained, "the Fourth Amendment has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons." *Leon*, 468 U.S. at 906. Thus, the court held that evidence is admissible so long as it is "seized by officers *reasonably relying on a warrant issued by a detached and neutral magistrate.*" *Id.* at 913 (emphasis added). *See also, United States v. Shields, supra*, 978 F.2d at 946-947 (holding that even if the district court had found the warrant invalid, by application of the *Leon* "good faith exception", suppression of the evidence would not have been required.)

As was the case in *Leon* and *Shields*, here the officers who executed the search warrant and seized the evidence at issue did so while "reasonably relying on a warrant issued by a detached and neutral magistrate." Therefore, even if the warrant were invalid due to the faxing procedures utilized by Magistrate Erdman, suppression of the evidence is not required.

IV. CONCLUSION

For all of the foregoing reasons, and for the further reasons stated by the Court on the record,

IT IS HEREBY ORDERED that Defendant's Motion to Suppress be, and hereby is, DENIED.

s/ Gerald E. Rosen
Gerald E. Rosen
United States District Judge

APPENDIX C — FEDERAL RULES OF CRIMINAL PROCEDURE, RULE 41

Rule 41. Search and Seizure

(a) Authority To Issue Warrant. Upon the request of a federal law enforcement officer or an attorney for the government, a search warrant authorized by this rule may be issued (1) by a federal magistrate, or a state court of record within the federal district, for a search of property or for a person within the district and (2) by a federal magistrate for a search of property or for a person either within or outside the district if the property or person is within the district when the warrant is sought but might move outside the district before the warrant is executed.

(b) Property or Persons Which May Be Seized With a Warrant. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.

(c) Issuance and Contents.

(1) *Warrant Upon Affidavit.* A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, that magistrate or state judge shall issue a warrant identifying the property or person to be seized and naming or

describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses the affiant may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property or person specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

(2) *Warrant Upon Oral Testimony.*

(A) General Rule. If the circumstances make it reasonable to dispense with a written affidavit, a Federal magistrate may issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means.

(B) Application. The person who is requesting the warrant shall prepare a document to be known as a duplicate original warrant and shall read such

duplicate original warrant, verbatim, to the Federal magistrate. The Federal magistrate shall enter, verbatim, what is so read to such magistrate on a document to be known as the original warrant. The Federal magistrate may direct that the warrant be modified.

(C) Issuance. If the Federal magistrate is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and that grounds for the application exist or that there is probable cause to believe that they exist, the Federal magistrate shall order the issuance of a warrant by directing the person requesting the warrant to sign the Federal magistrate's name on the duplicate original warrant. The Federal magistrate shall immediately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was ordered to be issued. The finding of probable cause for a warrant upon oral testimony may be based on the same kind of evidence as is sufficient for a warrant upon affidavit.

(D) Recording and Certification of Testimony. When a caller informs the Federal magistrate that the purpose of the call is to request a warrant, the Federal magistrate shall immediately place under oath each person whose testimony forms a basis of the application and each person applying for that warrant. If a voice recording device is available, the Federal magistrate shall record by means of such device all of the call after the caller informs the Federal magistrate that the purpose of the call is to

request a warrant. Otherwise a stenographic or longhand verbatim record shall be made. If a voice recording device is used or a stenographic record made, the Federal magistrate shall have the record transcribed, shall certify the accuracy of the transcription, and shall file a copy of the original record and the transcription with the court. If a longhand verbatim record is made, the Federal magistrate shall file a signed copy with the court.

(E) Contents. The contents of a warrant upon oral testimony shall be the same as the contents of a warrant upon affidavit.

(F) Additional Rule for Execution. The person who executes the warrant shall enter the exact time of execution on the face of the duplicate original warrant.

(G) Motion To Suppress Precluded. Absent a finding of bad faith, evidence obtained pursuant to a warrant issued under this paragraph is not subject to a motion to suppress on the ground that the circumstances were not such as to make it reasonable to dispense with a written affidavit.

(d) Execution and Return With Inventory. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be

made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The federal magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) Motion for Return of Property. A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court of the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property. The court shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be returned to the movant, although reasonable conditions may be imposed to protect access and use of the property in subsequent proceedings. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

(f) Motion To Suppress. A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12.

(g) Return of Papers to Clerk. The federal magistrate before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.

Appendix C

(h) Scope and Definition. This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects. The term "daytime" is used in this rule to mean the hours from 6:00 a.m. to 10:00 p.m. according to local time. The phrase "federal law enforcement officer" is used in this rule to mean any government agent, other than an attorney for the government as defined in Rule 54(c), who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant.

(As amended Dec. 27, 1948, eff. Oct. 20, 1949; Apr. 9, 1956, eff. July 8, 1956; Apr. 24, 1972, eff. Oct. 1, 1972; Mar. 18, 1974, eff. July 1, 1974; Apr. 26 and July 8, 1976, eff. Aug. 1, 1976; July 30, 1977, eff. Oct. 1, 1977; Apr. 30, 1979, eff. Aug. 1, 1979; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 25, 1989, eff. Dec. 1, 1989; May 1, 1990, eff. Dec. 1, 1990.)

APPENDIX D — MICHIGAN COMPILED LAWS, MSA 28.1259

SEARCH WARRANTS

Act 189, 1966, p 214;, eff March 10, 1967.

§ 28.1259(1). Search warrant; affidavit; issuance.

Sec. 1.(1) When an affidavit is made on oath to magistrate authorized to issue warrants in criminal cases, and • the affidavit establishes • grounds for issuing a warrant pursuant to this act, the magistrate, if he [or she] is satisfied that there is • probable cause • [for the search], shall issue a warrant to search the house, building, or other location or place where the property or thing •to be searched for and seized is situated.

(2) **[Affidavit by means of electronic communication.]** An affidavit for a search warrant may be made by any electronic or electromagnetic means of communication if both of the following occur:

> (a) The judge or district court magistrate orally administers the oath or affirmation to an applicant for a search warrant who submits an affidavit under this subsection.
>
> (b) The affiant signs the affidavit, Proof that the affiant has signed the affidavit may consist of an electronically or electromagnetically transmitted facsimile of the signed affidavit.

(3) **[Warrant, electronic issuance; court order for blood alcohol or controlled substance test, electronic issuance.]** A judge may issue a written search warrant in person or by any

electronic or electromagnetic means of communication. If a court order required pursuant to section 625a of the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being section 257.625a of the Michigan Compiled Laws, is issued as a search warrant, the written search warrant may be issued in person or by any electronic or electromagnetic means of communication by a judge or by a district court magistrate.

(4) **[Warrant, electronic issuance, proof of signature.]** The peace officer or department receiving an electronically or electromagnetically issued search warrant shall receive proof that the issuing judge or district court magistrate has signed the warrant before the warrant is executed. Proof that the issuing judge or district court magistrate has signed the warrant may consist of an electronically or electromagnetically transmitted facsimile of the signed warrant.

(5) **[Paper quality standards for warrants.]** The state court administrator shall establish paper quality and durability standards for warrants issued under this section.

(6) **[Oath or affirmation, electronic administration.]** If an oath or affirmation is orally administered by electronic or electromagnetic means of communication under this section, the oath or affirmation is considered to be administered before the judge or district court magistrate.

(7) **[Affidavits and warrants, electronically transmitted copies as duplicate originals.]** If an affidavit for a search warrant is submitted by electronic or electromagnetic means of communication, or a search warrant is issued by electronic or electromagnetic means of communication, the transmitted copies of the affidavit or search warrant are duplicate originals of the

affidavit or search warrant and are not required to contain an impression made by an impression seal.

(MCL § 780.651.)

APPENDIX E — EXCERPTS FROM THE REPORT ON THE ORGANIZED CRIME DRUG ENFORCEMENT TASK FORCE PROGRAM 1989-1990

REPORT ON

THE ORGANIZED CRIME DRUG ENFORCEMENT TASK FORCE PROGRAM

1989-1990

* * *

Office of the Attorney General
Washington, D.C. 20530
May 8, 1991

The Honorable George Bush
President of the United States
Washington, D.C. 20500

* * *

The Office of National Drug Control Policy has recognized the Organized Crime Drug Enforcement Task force Program's success and has cited this Program as the *vehicle and model for future efforts* in combatting major drug trafficking organizations. The unique expertise brought together by the eleven participating agencies from the Departments of Justice, Treasury, and Transportation and their state and local colleagues has continued to make the Task Force Program the "Flagship" of this nation's war on drugs.

Appendix E

Agency Participation in Investigations
(Exhibits 3a through 3d)

An OCDETF case is, by definition, a multi-agency case. Initial agency resource allocations may shift as an investigation progresses.

The most striking recent development in initiation figures was the planned involvement of local investigators in most cases, 56.6 percent, and of State investigators in more than 37 percent.

* * *

The U.S. Attorneys and the U.S. Marshals Service are assumed to be involved in all OCDETF case investigations.

* * *

Agency Participation
(Exhibits 7a through 7d)

The extensive involvement of State and local investigators predicted in investigation initiation data was validated in reports submitted at the time of indictments. Except for the Drug Enforcement Administration itself, no group was more often involved in OCDETF cases than local investigators, who participated in 61.5 percent of the cases indicted in FY 1989 and FY 1990. The same period also saw a significant increase in BATF involvement evincing the OCDETF response to the increasingly violent nature of the drug trade.

* * *